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IN THE
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October Term, 1982

Nos. 81-746 and 81-1172
AKRON CENTER FOR REPRODUCTIVE
HEALTH, INC., et al.

vs.

CITY OF AKRON, et al.

ON CERTIORARI TO THE UNITED STATES COURT
OF APPEAL FOR THE SIXTH CIRCUIT

BRIEF OF WOMEN LAWYERS OF SACRAMENTO, PLACER COUNTY WOMEN LAWYERS, AND AUBURN WOMEN'S CENTER

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U.S. Constitution, Amendment XIV

OTHER AUTHORITIES

The American Promise: Equal Justice and Economic Opportunity Report, Council on Economic Opportunity (1981).....19

California Department of Consumer Affairs, Pregnant Women and Newborn Infants: A Deepening in Health Care (1982).....15

Dallek, Geraldine, Maternal Health Care in America: Sliding Back Down the Mountain, Santa Monica - National Health Law Project, 1981.....16, 17

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Pearce, Diana "The Feminization of Poverty" Urban and Social Change Review (Feb 1978).....19

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INTEREST OF AMICI CURIAE AND CONSENT

The named county women lawyers associations are membership organizations consisting of women and men who seek elimination of sex discrimination through the legal profession. Members represent clients in California who have suffered gender discrimination in violation of federal protection under the Fourteenth Amendment of the U.S. Constitution.

Amici are concerned that the federal provisions that assure equal protection for all citizens are being unduly restricted by laws which create a double standard by requiring emancipation or parental consent for minor women seeking pregnancy terminations, and not for minor men, and which impose medically unnecessary burdens on women.

Amici are familiar with the scope and presentation of arguments which have been advanced by Amici Women Lawyers Association of Los Angeles and California Women Lawyers and concur in these arguments.

This brief is filed pursuant to Rule 36 of the Rules of the Supreme Court of the United States. Consent to the filing of the brief has been given by attorneys for both parties.

INTRODUCTION

This case asks difficult questions about the extent to which a government may impose burdens, in the guise of "protections," on women because they are women. This brief posits that the asserted justifications for the restrictions at issue are a sham, and that the

additional and unusual burdens imposed by the City of Akron on a woman's right to terminate her pregnancy are unsupportable under our Constitution as previously interpreted by this Court.

The authors of this brief acknowledge to the Court and to the world that women are biologically different from men. We acknowledge that only women can become pregnant. A fortiori, we believe, only the woman can decide to terminate her pregnancy.

This Court has recognized that principle. This Court has characterized the decision to terminate a pregnancy as one that is personal to a woman and her physician. The Court has instructed the nation that privacy in the exercise of that decision is constitutionally required.

This brief questions the extent to which a city may heap unusual medical, financial, familial and social requirements on the exercise of this particular medical decision. Amici ask the Court to consider whether laws imposing these burdens should be permitted to escape strict scrutiny under the Equal Protection Clause of the United States Constitution for no other reason than that the basic burden - - the pregnancy - - can fall upon women alone.

The Court has repeatedly held that the fundamental right to privacy in matters involving contraception, marriage and the right to procreate shall not be infringed. Harris v. McRae 448 U.S. 297 (1980); Roe v. Wade 410 U.S. 113 (1973); Eisenstadt v. Baird 405 U.S. 438 (1972); Griswold v. Connecticut 381 U.S. 479 (1965).

The instant statute allows the City to infringe on this fundamental right by placing unnecessary burdens only on the procreative choice of females. Women, but not men, must (1) if they are minors, obtain their parents' consent for a pregnancy termination; (2) incur the expense of hospitalization for second trimester terminations; and (3) be subjected to unnecessary physician counseling. Amici address in this brief the most pernicious of these requirements: mandatory parental approval for minor females, mandatory physician counseling, and mandatory hospitalization.

Amici respectfully request the Court's recognition of the fact that pregnancy in itself is an unusual physical, personal and financial burden, and that the burden falls hardest on unmar-

ried, poor, minor women. Amici ask the Court to imagine the stress of nine months of unwanted pregnancy, and to be mindful of the life prospects for an unwanted child. Amici ask the Court to avoid burdening women with a duty imposed on no other person under the law. Amici respectfully urge this Court to strike down laws which individually and collectively impinge upon a woman's right to terminate her pregnancy and which have, until now, avoided scrutiny because the suffering falls only on one sex.

ARGUMENT

I

THE AKRON ORDINANCES CREATE A DOUBLE STANDARD.

A. Sexually Active Men And Women Under Age 18 Are Treated Differently.

Gender-based classifications may not be based on archaic assumptions about the proper role of the sexes. Reed v. Reed 404 U.S. 71 (1971); Frontiero v. Richardson 411 U.S. 677 (1973); Craig v. Boren 429 U.S. 190 (1976); Califano v. Wescott 443 U.S. 76 (1979); Wengler v. Druggist Mutual Insurance Co. 446 U.S. 142 (1980); and Mississippi University for Women v. Hogan ___ U.S. ____, 50 USLW 5068, 5070 (July 1, 1982,).

In Akron, unemancipated young women who become pregnant are burdened by regulations which require parental consent to the decision to terminate a pregnancy. Even if these young women are emancipated, their parents must still consent, except upon a court's order that the pregnancy be terminated. Young men, though equally responsible and interested in the pregnancy, are subject to no similar regulation.

By omitting young men from the purview of this statute, Akron implies that young men are sufficiently mature to regulate their procreative activity and therefore not in need of parental guidance or supportive conversation. The parents of sexually active young men under 18 may never know of their sons' responsibility for resultant pregnancies.

These provisions allow young men to abrogate their responsibilities and serve only to perpetuate the double standard which permits men to be sexually active but requires that women be chaste or suffer the consequences.

B. The Parental Consent Requirement Stigmatizes and Punishes Minor Women

The psychological burden of an unwanted pregnancy effectively stigmatizes young women.

Kenneth Karst in "Equal Citizenship Under the Fourteenth Amendment" 91 Harvard Law Review 1, 57 (1977) states that women will achieve equal citizenship only when the judiciary rejects the symbolism of dependency. However, Karst points out this will not occur as long as:

> (1) our society's traditional double standard of sexual morality . . . places a greater stigma on unmarried women who become pregnant, than on the men who father their children; (2) our society's continuing expectation is that women take the major responsibility for contraception and childcare. Id., 37.

As long as the City of Akron continues to place burdens solely on women, it supports this double standard for men and women and stigmatizes women.

Karst points out that when one person is singled out for treatment which places her in a dependent status, e.g. by requiring a young woman seeking a pregnancy termination to notify her parents, her identity is damaged. Enforced dependency results in second-class status. The young woman becomes a victim who "suppresses aspirations that look unattainable when seen with the restricted vision imposed by a withered self-concept." Id., 7.

As long as women must suffer medically unnecessary, legislatively-imposed restrictions, but men need not, women are stigmatized, and men escape unscathed for the same conduct. Such restrictions "reflect archaic and stereotypic notions". Mississippi University for Women v. Hogan, supra, 50 U.S.L.W., 5070.

It is established that "the absolute nature of the statutory requirement. . . violates the requirement that regulation in this fundamentally personal area be carefully tailored to serve significant [governmental] interests." H.L. v. Matheson, supra, 450 U.S. 446. However, given the social stigma and medical dangers involved in childbirth for minor women, to preclude termination of an unwanted pregnancy because of statutorily imposed parental intervention not only

fails to serve such an interest, but also serves only to punish pregnant minors. Men, no matter what age, are not subject to similar parental intervention.

II

BECAUSE AN UNWANTED PREGNANCY PER SE CONSTITUTES A BURDEN ON A WOMAN, MEDICALLY UNNECESSARY RESTRICTIONS ON PREGNANCY TERMINATIONS VIOLATE EQUAL PROTECTION.

A. Pregnancy Itself Constitutes A Burden On Women

1. Physical Burden

Donald H. Regan, in "Rewriting Roe v. Wade" 77 Michigan Law Review 1569 (1979) fills four pages with the ordinary complaints which accompany any pregnancy. From faintness and nausea to the risk of death in childbirth, virtually all women must "...put up with enough pain, discom-

fort and disruption of appearance and emotional city to add up to a major burden."

Regan further states, "It is worth mentioning that all of the pains and discomforts listed above are likely to be aggravated when the entire pregnancy is unwanted. It is much easier to bear up under pain and inconvenience when they serve some end one has chosen than when they do not...." Id., 1582.

Regan discusses the equal protection aspects of pregnancy termination through the use of a "good samaritan" tort analysis. Id., 1636. No person has a duty to come to the assistance of any other person except in the abortion context, where a woman is required to sacrifice herself for a fetus. The city's interest in potential life can never justify forcing

a woman to risk her health for another life. Id., 1640. No woman should be forced by any other person or the city to bear children. This is symptomatic of a totalitarian society that does not support "constitutional values [such as] non-subordination, freedom from physical invasion, and equal protection." Id., 1639.

2. Lack Of Adequate Medical Care

In addition to the personal physical burden of pregnancy, women experience difficulty in obtaining medical care. In many parts of the country, family planning and prenatal services are virtually nonexistent. In March 1982, the State of California reported that basic obstetric and gynecologic services from high quality fee-for-service physicians and private

hospitals are unavailable to all but the most affluent. California Department of Consumer Affairs, Pregnant Women and Newborn Infants: A Deepening Crisis in Health Care.

The consequences of inadequate access are seen most graphically in comparisons of infant mortality rates. For example, the infant mortality rate in Scandinavian countries is six per one thousand.*

In California, the infant mortality rate is 12.3 per one thousand for white infants. This rate doubles in medically underserved areas: for example, for Black infants in Oakland, the rate is

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*This rate correlates with national health insurance programs which provide coverage for all pregnancies and all pregnancy terminations, plus universal access to contraceptives, irrespective of age.

23.6 per 1,000; for Hispanic infants at L.A. County Medical Center, 25 per 1,000; and for infants born in rural El Dorado County, 23 per 1,000. Lower rates of infant mortality correspond to prenatal care during the first trimester. Dallek, Geraldine, "Maternal Health Care in America: Sliding Back Down the Mountain," National Health Law Project, 1981,5.

This lack of adequate care constitutes a burden on pregnancy over which pregnant women have no control. It is another burden in the area of procreative freedom which affects only women.

3. Parenthood And Poverty

Financial barriers compound the demographic/geographic lack of access to medical care.

The Supreme Court in Harris v. McRae 448 U.S. 297 (1980) held that the federal government may choose to fund childbirth and not pregnancy termination. Since then, governmental financial policies have effectively denied access to health care during pregnancy for significant numbers of women.

Even childbirth in hospitals is precluded for financial reasons. Hospital imposed financial restrictions often include requiring deposits or Medicaid co-payments, and requiring on-staff referring doctors for admission or doctors who will accept Medicaid patients.

Dallek's study, "Maternal Health Care" etc., supra found that financial constraints alone, without additional restrictions, resulted in more than fifty percent of all children in Brownsville,

Texas being born outside hospitals. Dallek also documents that nineteen citys do not cover first-time pregnant women under their Medicaid programs.

In many areas it is not unusual for all but government-funded hospitals to reject women in labor. These institutions often go bankrupt because indigent care drains the financial resources of the state or local government. In California, between 1970 and 1980, 24 out of 57 county hospitals were closed for this reason.

Thus, the irony of governmental refusal to pay for pregnancy termination compounds the ignominy of its refusal to pay for childbirth and prenatal care in a hospital or clinic.

The National Advisory Committee on Economic Opportunity in "The American

Promise: Equal Justice and Economic Opportunity," (1981) concluded that over fifty percent (217,000) of all poor families are headed by women.

In a seminal article, "The Feminization of Poverty: Women, Work and Welfare," Urban and Social Change Review (February, 1978), Diana Pearce outlines the shift of poverty from two-parent households to women-headed households in the 1980's. More than forty-six percent of these women were never married and a majority of them did not see a doctor at all until the second trimester of pregnancy.

This Court noted the link between poverty and teenage pregnancy in Michael M. v. Sonoma 450 U.S. 470 fn.3 and 4, citing the Alan Guttmacher Institute's 11 Million Teenagers, at 10, 13, 23, 25.

Frequently undereducated because they left school as a result of unwanted pregnancies, these women barely subsist on Aid For Dependent Children (AFDC) programs.*

The physical, financial and personal burdens of pregnancy are magnified when the pregnancy is unwanted, or when it befalls a minor, unmarried woman. Even in the absence of any statutory restrictions, an unwed woman seeking a pregnancy termination must overcome severe hurdles. Initially, she must find a doctor who will see her to determine whether she is

*These programs range from $26.00 per person per month in Mississippi to $119.00 per person per month in New York. The average for the nation is $5,318.00 for families on welfare compared with the $21,703.00 national median income of two-parent working families.

pregnant. In rural areas of the U.S. and in medically underserved urban areas, it may be difficult to locate a local doctor. A woman frequently must travel to a distant community that provides obstetric and gynecological care. She is therefore faced with transportation and lodging expenses. If an individual is indigent, the number of doctors taking Medicaid is severely restricted because these rates are below private rates. All of these factors serve only to delay, thereby increasing the duration of the procedure, the cost of medical treatment, the psychological damage, and the chance of maternal death.

4. **Cumulative Burden**

As herein demonstrated, any unwanted pregnancy constitutes a burden on women. The additional burdens imposed by the

proposed ordinances increase these financial, physical and psychological burdens by requiring hospitalization, imposing medically unnecessary procedures and extraordinary counseling, requiring a 24-hour delay and parental consent for minor women.

III

AKRON HAS FAILED TO DEMONSTRATE THAT PARENTAL CONSENT FURTHERS ANY IMPORTANT GOVERNMENTAL INTEREST SUBSTANTIALLY RELATED TO THE GENDER CLASSIFICATION

Among the interests proffered by the City in justification of the gender classification inherent in the consent requirement are the protection of maternal health and the promotion of family integrity. These interests are spuriously asserted in this instance.

A. The Parental Consent Requirement Fails To Promote the City's Interest in Maternal Health.

City policies that discriminate on the basis of gender must show that the classification serves "important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. " Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142, 150. The classification must assist "members of the sex that is disproportionately burdened." Mississippi University for Women v. Hogan, 50 U.S.L.W. 5069.

Parental consent in Akron is an absolute barrier to pregnancy terminations performed in hospitals, because all hospitals require this consent.

Akron has failed to make any showing that a substantial governmental interest in maternal health is furthered by the parental consent requirement. The City implies that only parental consent can foster maternal health indirectly by promoting parental guidance on the topic of pregnancy. Allegedly, the ordinance, like the Utah statute in H.L. v. Matheson, supra 450 U.S. 424, "would tend to facilitate communication between daughters and parents."

However, the Court in H.L. failed to mention the parental communication which might prove helpful between the male, who must share the responsibility for the pregnancy, and his parents. This type of statute thus assumes that female minors are unable to make decisions regarding contraception and pregnancy, while male

minors are able to so decide. This distinction is unjustified by any showing made by Akron, especially in light of the generally-accepted premise that females mature earlier than males.

During the second trimester of gestation, each day of delay pushes the pregnant woman into greater medical danger. The stated purpose of protecting maternal health certainly is not achieved under this ordinance.

If mandated parental consent does, in fact, support a substantial interest in communication between parents and children concerning pregnancy, then parents of minor males must also logically be notified.

B. Parental Consent Requirements Do Not Serve the City's Interest in Protecting Family Integrity.

News reports daily confirm that young women are subject to sexual assault by fathers, step-fathers, other male relatives and boyfriends (See, e.g., Sacramento Bee, July 14, 1982; See also Planned Parenthood Association of Kansas City v. Ashcroft, 655 F.2d 848,859, fn. 13 (1981), where data is cited showing that 50% of children age 12 and younger who seek abortions are incest victims.) Others are victims of child abuse, parental alcoholism and drug abuse, mentally ill parents, and the stresses accompanying divorce. Forced communication between pregnant minor females and parents who endanger these children can hardly be deemed to promote family integrity.

According to Justice Marshall, dissenting in H.L. v. Matheson, supra 450 U.S. 448, the purpose of cases protecting parental authority is to protect the family from governmental intrusion, not to justify mandatory governmental intrusions. "Whatever its motive, [governmental] intervention is hardly likely to resurrect parental authority that the parents themselves are unable to preserve."

IV

THE ORDINANCE MANDATING HOSPITALIZATION FOR PREGNANCY TERMINATIONS CREATES AN UNNECESSARY CLASSIFICATION SCHEME BASED ON GENDER.

A. Akron's Hospitalization Requirements Apply Only To Pregnancy Terminations And Not To All Surgeries With Similar Risks.

Although states often seek to protect the health and well-being of their citizens by requiring physicians to be examined and licensed by the City and by requiring hospitals and clinics to meet various building and inspection standards for licensure, states do not generally substitute legislative dictates for a physician's judgment on how best to medically treat a specific patient. See Doe v. Bolton, 410 U.S. 179, 199 (1973). Rather, the emphasis in our society has been precisely opposite, that is, to encourage and respect the physician's judgment and expertise in medical areas. As this Court has previously stated,

> "...medical judgment may be exercised in the light of all factors [such as] physical, emotional, psychological, familial, and the woman's age - relevant to the well-being of the patient.... This allows the attending physician the room he needs to make his best medical judgment. And

it is room that operates for the benefit, not the disadvantage, of the [patient]." Id., 192.

Yet, Akron has attempted to impose its legislators' decisions in place of the doctor's best medical judgment concerning the health of the patient. No other surgical or medical procedures are so burdened. Thus, a doctor may assess, free from the chill of statutory prohibitions, all relevant factors pertaining to the health of the individual patient when determining whether to perform a vasectomy, a commonly used male sterilization procedure, in a medical office, a clinic or a hospital. If a doctor does not exercise adequate medical judgment and a patient is injured because a procedure is improperly performed on an out-patient basis, then the doctor will be subject to civil liabilities, Doe v. Bolton, 410 U.S. at 199.

Under the Akron law, however, if a doctor weighs all the factors relating to the health of his patient and, in the exercise of sound medical judgment, elects to perform a pregnancy termination in an office or a clinic, that election will have violated the legislative proscription. To isolate pregnancy terminations in this way "treats differently, without a compelling reason, medical procedures which in terms of health risk are not distinguishable." Friendship Medical Center v. Chicago Board of Health, 505 F.2d 1141, 1153 (7th Cir.) cert. denied 420 U.S. 997 (1974). Such differential treatment violates the Equal Protection Clause of the Fourteenth Amendment. See Doe v. Bolton, supra, 410 U.S. 194; Planned Parenthood of Akron v. Danforth, 428 U.S. 52, 77-78 (1976);

Bellotti v. Baird, 428 U.S. 128, 149-150 (1976).

In the instant case, not only is the differential treatment violative of equal protection rights, but also, since ordinances differ from city to city, pregnant women will be affected differently depending upon where they live.

The ordinance challenged here does not directly regulate the conduct of women seeking second trimester abortions. However, this Court has consistently recognized that restricting the operations of providers of goods or services may "result indirectly in the violation of third parties' rights." Warth v. Seldin, 422 U.S. 490, 510 (1975); Carey v. Population Services International, 431 U.S. 684, 694 (1977); Craig v. Boren, 429 U.S. 190, 195 (1976).

In the instant case, a female patient seeking pregnancy termination would be denied "the right to receive medical care in accordance with her licensed physician's best judgment" and the physician would be denied " the right to administer it." Doe v. Bolton, 410 U.S. at 197.

There is no similar context in which a class of male patients has been denied the medical care which a physician deems best for the particular patient. Such differential treatment establishes a statutory classification that distinguishes between males and females solely on the basis of gender.

B. Sanctions Against Performing Pregnancy Terminations In Non-hospital Facilities Result In Invidious Discrimination.

This Court has repeatedly held that "gender-based discriminations must serve important governmental objectives and that the discriminatory means employed must be substantially related to the achievement of these objectives." Wengler v. Druggists Mutual Insurance Co., supra, 446 U.S. 142, 150

The alleged city interest in the hospitalization requirement at issue is maternal health. Akron has the burden of showing a direct and substantial relationship between the hospital requirement and the objective of protecting maternal health. Mississippi University for Women v. Hogan, ___ U.S. ___, 50 U.S.L.W. 5068, 5070. Akron has failed to satisfy this burden.

There is no evidence in this case that licensed physicians in Akron are

incapable of making reasoned decisions when selecting medical settings for the performance of minor surgery. Yet the city, to rationalize its ordinance, must believe that doctors are competent to select proper settings for all types of surgery except pregnancy terminations.

Akron has failed to establish that licensed physicians are incompetent in caring for these patients. This Court is respectfully requested to find that licensed physicians exercise the same degree of care in determining which patients to hospitalize irrespective of the medical condition of the patient.

The necessary inference derived from the ordinance that physicians who perform pregnancy terminations are less competent than other physicians, is a mechanical application of an inaccurate stereotype

about the need of women for special protection. Further, such a legislative judgment has been held improper. Mississippi University of Women v. Hogan, supra ___ U.S. ___, 50 U.S.L.W. 5070. In the era of back-alley and kitchen-table abortions and less sophisticated medical procedures, a legislative body may have had a legitimate basis for regulating the setting for pregnancy terminations. Such is far from the case in the 1980's. All the medical practitioners performing pregnancy terminations subject to the hospital requirements at issue herein are licensed physicians.

Akron has failed to establish that non-hospital settings are inherently unsafe. A common pregnancy termination technique, dilatation and evacuation (D & E) is safely performed in out-patient

clinics through the 17th and 18th weeks of pregnancy, well into the second trimester. Since the Roe decision in 1973, specialized clinics for the performance of legal pregnancy terminations have had nearly 10 years to train and develop staff with expertise in these procedures.

In the modern factual setting, licensed physicians must be free to exercise their professional judgment in selecting appropriate settings for all medical procedures without legislative interference. To decide otherwise is to unwisely hold onto the shibboleths of the past. The City's hospitalization requirements merely reinforce the traditional sexual stereotype that women need special protection. These medical myths have led to gender-based classifications and legislative decisions which are

unconstitutional as well as unwise. This Court has recognized that in the areas of medicine and pregnancy termination rights, local governments must readjust their "views and emphases in the light of the advanced knowledge and techniques of the day." Doe v. Bolton, 410 U.S. 179, 190-191 (1973).

Akron has failed to demonstrate that pregnancy termination complications are not as safely treated by a licensed physician in a non-hospital medical facility as in a hospital. Serious complications during and after a pregnancy termination are rare and can occur in any setting, including a hospital. Mahoning Women's Center v. Hunter, 444 F.Supp. 12, 15 fn 7 (N.D. Ohio 1977). Akron has not met its burden of showing that a licensed physician exercises poor judgment by treating

those rare complications in a licensed clinic rather than in a hospital. Moreover, many doctors believe there is an increased risk of complications when pregnancy terminations are performed in hospitals instead of in out-patient clinics. Because of exposure to a larger patient population, some of whom are suffering from communicable diseases, there is an inherently greater risk of infection in a hospital than in a smaller clinic.

No similar prohibitions are imposed on licensed physicians attending home births, at which the risk to maternal health is as great as or greater than that borne by a woman undergoing an pregnancy termination at a well-equipped, licensed medical clinic. Similarly, there is no proscription against the

performance of amniocentesis by licensed physicians in clinics. If the risk to maternal health were in fact the real basis for the mandatory hospitalization requirement, the same requirement would logically be extended to childbirth and amniocentesis.

In reality, Akron cannot show that its hospital requirement is substantially related to the protection of maternal health.

Ironically, the mandatory hospitalization requirement, which many women cannot afford, may in fact be forcing women to return to back-alley, non-physician pregnancy terminations.

Akron has further failed to establish that a gender-neutral scheme is a less effective means of achieving its important governmental objective. Wengler v.

Druggist Mutual Insurance Co., supra, 446 U.S. 151, and Orr v. Orr, supra, 440 U.S. 282.

Akron has a gender-neutral mechanism for the protection of maternal health without the need for extraordinary prohibitions imposed upon doctors and patients. Akron licenses all physicians, and regulates and licenses all medical facilities, including clinics. Aggrieved and injured patients have access to the courts of Akron to file claims against physicians and clinics for negligence and other malpractice. All these protections exist without reference to gender. Therefore, the City's imposition of the hospitalization requirement attempt to protect interests in maternal health, already adequately protected. These extra layers of city intervention direct-

ly hamper the ability of doctors to practice medicine. See Word v. Poelker, 495 F.2d 1349, 1351 (8th Cir. 1974).

Akron has been unable to demonstrate that it requires physicians who perform minor surgery with risks equal to those of pregnancy termination to operate only in hospitals. "[T]hat the state is ordinarily willing to leave such matters to the professional judgment of the attending physician strongly suggests that the program for regulating abortion clinics is a thinly disguised effort to evade Roe and Doe." Friendship Medical Center, Ltd, v. Chicago Board of Health, 505 F.2d 1141, 1153 fn. 17 (7th Cir. 1974), cert. denied, 420 U.S. 997 (1975). This premise is even more imperative as applied to local governments.

Once this Court abandons the traditional notion that female patients require special legislative protection from licensed physicians who perform pregnancy terminations, there is no basis for finding a substantial relationship between the hospitalization requirement and the governmental objective. Cf. Mississippi University for Women v. Hogan, supra, at 5070 fn.11.

CONCLUSION

Under the guise of protections, legislatures have denied women access to professions, schools, and now adequate medical care. No man, even when his reproductive capacity is at stake in sterilization procedures, is subjected to nonmedical barriers to care. The government chooses not to interfere because it recognizes the necessity of speedy treatment and respects the doctor/patient relationship.

Not so with women. Here the City presumes to establish nonmedical preconditions for treatment. These conditions are unrelated to treatment. Each day a pregnancy termination is delayed because of parental consent, hospitalization, or any other legislative order, the risks to her life and health increase. Hence,

even if the City has a vested interest in maternal health, this interest is not served by delaying and complicating pregnancy terminations. Denying access to medical care to women but not to men through impermissible nonmedical barriers constitutes a denial of equal protection.

Respectfully submitted,

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